93-708

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CAROL J. APPLEWHITE,

Petitioner,

v.

UNITED STATES AIR FORCE,
RANDALL L. FAULKNER, LEONARD ROSS,
AND WILLIAM E. MCBRIDE,

Respondents.

Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

JOHN R. POLK
Counsel of Record
United New Mexico Bank Building
320 Gold, S.W., Suite 910
Albuquerque, NM 87102
(505) 247-1100

QUESTIONS PRESENTED

The questions presented for review are:

1. Whether Air Force OSI agents had qualified immunity for their 1986 actions in detaining and transporting a civilian onto a military reservation, searching her and holding her on the reservation while they contacted the civilian authorities who declined to prosecute her?

2. What, if any, constitutional and legal constraints limit the actions of military police who pick up civilians in off-base drug "busts" of military personnel?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are all identified in the caption. There are no parent companies or non-wholly owned subsidiaries involved in the proceedings.

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UNITED STATES AIR FORCE,
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Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Carol J. Applewhite, (hereinafter "Applewhite") respectfully petitions this Court for a writ of certiorari to review the decisions of the Tenth Circuit Court of Appeals entered in this case on June 9, 1993 and August 10, 1993.

OPINIONS BELOW

The Memorandum Opinion and Order, entered March 19, 1992, of the United States District Court for the District of New Mexico, No. CIV 88-0821 SC, is unreported and is set forth in Appendix B. Pet. App. 15a-30a. The decision of the Tenth Circuit Court of Appeals is reported at 995 F.2d 997 and is set forth in Appendix A. Pet. App. 1a-14a.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered June 9, 1993. Applewhite's timely Petition for Rehearing, Appendix E. Pet. App. 37a, was denied by an Order entered August 10, 1993. Appendix C. Pet. App. 31a-32a. This Court has jurisdiction to review the judgment of the Tenth Circuit Court of Appeals under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fourth Amendment, Security from Unreasonable Searches, U.S. Const., Amend. IV, and Fifth Amendment, Rights of Accused in Criminal Proceedings, U.S. Const. Amend. V, to the United States Constitution and the *Posse Comitatus* Act, 18 U.S.C. § 1385. These provisions are set forth in Appendix C. It should be noted that the military activities complained of took place in 1986, three years prior to the 1989 provisions authorizing the Secretary of Defense to prescribe regulations governing drug enforcement "support" activities by the military. See, discussion of 10 U.S.C. § 375, set forth in Appendix D, Pet. App. 35a, in *United States v. Thompson*, 33 M.J. 218 (U.S. Ct. Mil. App. 1991), *cert. denied*, 112 S. Ct. 972 (1992).

STATEMENT OF THE CASE

This is an action under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 - 2680 and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), brought by a civilian who was caught up in an off-base drug "sting" operation conducted by Air Force OSI officers. Pet. App. 16a. The Federal District Court for the District of New Mexico had jurisdiction pursuant to 28 U.S.C. § 1346(b) and 28 U.S.C. § 2680(h).

In August 1986, Petitioner Applewhite accompanied her husband, a member of the United States Air Force, to an off-base apartment. At the apartment, Applewhite's husband participated in a drug purchase and was arrested by the OSI officers. Pet. App. 16a. Applewhite, who was in her postal service uniform at the time, was also taken into custody, pat-down searched, handcuffed and

transported by the OSI officers to a nearby Air Force base where she was subjected to a partial strip search. Pet. App. 16a. After Applewhite was brought to the Air Force base, the OSI agents contacted the civilian law enforcement authorities who declined to prosecute. Pet. App. 16a. Applewhite was then interviewed, brought to a room where her husband was being detained and eventually released. Pet. App. 16a. Applewhite's husband was later court martialed. Pet. App. 16a. The OSI officers reported the incident to Applewhite's superiors at the Postal Service, and she was discharged from her employment. Pet. App. 16a-17a.

Thereafter, Applewhite brought a Federal Tort Claims action against the Air Force and a *Bivens* action against the individual OSI officers for constitutional and statutory violations, specifically a violation of the *Posse Comitatus* Act. Pet. App. 17a. Applewhite successfully served three of the individual

OSI officers, Randall L. Faulkner, Leonard Ross and William E. McBride. The Federal District Court for the District of New Mexico denied an initial motion for summary judgment filed by Ross and Faulkner based on qualified immunity in August 24, 1989. Pet. App. 17a. At that time, the District Court found that "law enforcement officers generally know that it is clearly established law that they have absolutely no authority to go outside the confines of a military installation and arrest a civilian, transport her to a military installation, detain and strip search her." Pet. App. 18a. None of the defendants appealed the 1989 ruling by the District Court.

In early 1992, shortly before the date set for trial, Ross and Faulkner reasserted their qualified immunity defense and McBride brought a qualified immunity motion for the first time. Pet. App. 18a. In its Memorandum Opinion and Order, the District Court carefully reviewed evidence concerning the

participation of each of the three individual officers in the incident. Pet. App. 19a-24a. The District Court found that "there was no coordination with any civilian law enforcement authority until after the fact." Pet. App. 21a. *Contrast* the fact situations in *Taylor v. State*, 645 P.2d 522 (Okla. Crim. App. 1982), and *United States v. Walden*, 490 F.2d 372 (4th Cir. 1974) *cert. denied*, 417 U.S. 977 (1974), where there was active coordination between military and civilian authorities prior to and at the time of the "bust."

The District Court concluded that defendant McBride's activity in planning the "bust" and in failing to protest Applewhite's detention and transportation to the military base was not "objectively reasonable as a matter of law." Pet. App. 22a. The District Court also concluded that Faulkner and Ross' activities in detaining Applewhite at the base were not objectively reasonable as matter of law. Pet. App. 24a.

The District Court Memorandum Opinion and Order also considered the defendants' argument that "the individual Defendants are entitled to qualified immunity because it was not clearly established that the *Posse Comitatus* proscription against military involvement in civilian law enforcement would encompass a case like this where 'a civilian is swept up in an operation intended to detect and punish wrongdoing by military personnel.'" Pet. App. 25a. The District Court rejected this argument and held that it had already established as "law of this case" that the treatment of Applewhite involved a violation of clearly established law. Pet. App. 25a.

The District Court further noted that *Bissonette v. Haig*, 800 F.2d 812 (8th Cir. 1986) (*en banc*), *aff'd, for absence of quorum*, 485 U.S. 264 (1988), recognized a *Bivens* private cause of action for damages for violation of the *Posse Comitatus* Act. Pet. App. 27a. In *Bissonette*, Native Americans were confined to the

village of Wounded Knee by civilian roadblocks. The military provided personnel and equipment for surveillance. The court recognized a possible *Bivens* claim for violation of Fourth Amendment rights by reason of the *Posse Comitatus* Act.

On appeal, the Tenth Circuit Court of Appeals added a number of allegedly "undisputed facts," not in the findings of the District Court, concerning Applewhite's participation in the drug sale and her alleged possession of contraband. Pet. App. 2a-7a. As pointed out in Applewhite's Petition for Rehearing, these facts were not "undisputed," and the Tenth Circuit improperly resolved the disputed facts in favor of the officers instead of Applewhite. Applewhite's Petition for Rehearing is set forth in Appendix E. Pet. App. 37a. In any event, the Tenth Circuit stated that:

> **The totality of the foregoing made it reasonable for the agents to regard [Applewhite] as a participant with [her husband] in a narcotics buy and remove her *somewhere* while the Albuquerque**

> Police were contacted to see if they would take over this civilian intruder/ participant in the military "sting." ... The agents were not required to let her go, given what they had learned about her, nor were they required to hold her in the "sting" apartment or in a car while waiting for an answer from the Albuquerque Police Department. Accordingly, the removal to the base with her husband was, we conclude, reasonable. Given all this, the partial strip search at the base was the product of particularized, reasonable suspicion and was not unreasonable, particularly in view of what the pat-down search at the apartment had already revealed...

Pet. App. 11a-12a, citations omitted.

The Tenth Circuit went on to hold that "Mrs. Applewhite's husband, not the military, was responsible for the involvement of his civilian wife. This being established on the undisputed facts on this record, there was no violation by the OSI agents of any 'clearly established statutory rights' of Mrs. Applewhite." Pet. App. 13a. As to the existence of a principle of established law constraining military

authorities from detaining and transporting civilians onto military bases, the Tenth Circuit held that:

> [Applewhite] having been brought in to the point of sale by her buyer husband, and the contraband thereafter found on her person, it was objectively reasonable for the agents to detain the plaintiff somewhere long enough to inquire as to whether civilian authorities had any interest in taking over any prosecution. In these circumstances, the agents could hardly have justified her immediate release just because she was a civilian.

Pet. App. 13a-14a.

In other words, the Tenth Circuit has held that once a civilian is caught up in an off-base military drug "bust," and the military finds contraband on the civilian, it is objectively reasonable to transport and detain the civilian in **any** location, including a military detention facility, for whatever time it takes to contact the civilian authorities. Applewhite continues to object to the Tenth Circuit's improper resolution of disputed facts in favor of the defendants. However, even accepting the Tenth Circuit's resolution

of the facts, the Court's failure to set any limits on the military treatment of civilians on the scene of military drug enforcement activities renders the *Posse Comitatus* Act meaningless in the Tenth Circuit. Inasmuch as this Court has not recently considered the issue of civilians who are taken into custody off base by military law enforcement officers, Applewhite respectfully requests this Court to review the question of what, if any, legal and constitutional constraints should apply to off-base "busts" of civilians by military authorities for activities not undertaken for a legitimate military or foreign affairs purpose.

REASONS FOR GRANTING THE WRIT

I. ALTHOUGH THIS COURT HAS STATED THAT UNLAWFUL ACTIVITIES BY THE MILITARY WILL NOT GO UNREMEDIED, IT HAS NOT SPELLED OUT A SPECIFIC JUDICIAL REMEDY. THE JUDGMENT IN THE PRESENT CASE EFFECTIVELY FORECLOSES ANY JUDICIAL REMEDY IN THE TENTH CIRCUIT.

The separation of military and civilian affairs in peacetime is a traditional principle of American public policy which dates back to the American Revolution. In 1972, this Court held that:

> The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveillance activities ... reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs...Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

Laird v. Tatum, 408 U.S. 1, 15-16 (1972). The framework of this judicial remedy was not specifically set forth.

The Congressional expression of the separation between the military and civilian authorities has been

incorporated into a criminal proscription known as the *Posse Comitatus* Act. The *Posse Comitatus* Act provides that:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1385.

In 1986, the Eight Circuit Court of Appeals considered the argument that military intrusion into a civilian law enforcement operation in violation of the *Posse Comitatus* Act was actionable as a direct violation of the Fourth Amendment under the rule in *Bivens*. *Bissonette*, 800 F.2d at 813-814. The Fourth Amendment was considered because the military activity in the *Bissonette* case was confined to the provision of surveillance personnel and equipment. The Court dismissed a Fifth Amendment claim

because the plaintiffs were already entitled to relief under the Fourth Amendment. *See* discussion by panel in *Bissonette v. Haig*, 776 F.2d 1384, at 1391-1392 (8th Cir. 1985), *aff'd en banc* by *Bissonette*, 800 F.2d 812 (8th Cir. 1986). In *Bissonette*, the Eight Circuit concluded that:

> In the present case...we deal with something quite different from a seizure simply unauthorized by statute. We deal with a seizure affirmatively forbidden by a criminal law of long standing, itself expressive of an authentically American tradition of even longer standing. We conclude...that the complaint states a claim under the Fourth Amendment.

Bissonette, 800 F.2d at 816. The Eighth Circuit decision was affirmed by this Court for lack of a quorum. *Bissonette*, 485 U.S. 264 (1988). There was no consideration of the merits by this Court. Applewhite's *Bivens* claim is well grounded in existing caselaw, such as it is. *Bissonette*; *Laird*.

The Tenth Circuit judgment in the present case did not specifically foreclose the possibility of a *Bivens*

action based upon military intrusion into civilian law enforcement. However, the language used in the judgment suggests that such an action would be met with judicial disapproval. "Airman Applewhite was court-martialed for the said events of August 1, 1986. Mrs. Applewhite. on the other hand, filed a *Bivens* action for damages..." Pet. App. 5a-6a. More importantly, the fact situation in the present case is so egregious as to have a chilling effect on future attempts to seek a remedy for military intrusion into civilian law enforcement in the Tenth Circuit. It is difficult to conceive of a more pervasive military intrusion than taking a civilian into custody, transporting her to a military base, searching and detaining her on the military reservation. See discussion of exclusionary rule cases below. All of this activity was justified by the Tenth Circuit on the grounds that civilians caught up in off-base miliary drug busts are merely "intruder/participants" in

military law enforcement activities and, therefore, are not entitled to any rights by virtue of their civilian status. Pet. App. 11a. If this is objectively reasonable under existing law, the *Posse Comitatus* Act has become an anachronism, and there is no judicial remedy for unlawful military activities, at least not in the Tenth Circuit.

II. THE TENTH CIRCUIT JUDGMENT FLIES IN THE FACE OF CONGRESSIONAL INTENT TO PREVENT THE MILITARY FROM PARTICIPATING IN SEARCH AND SEIZURES AND ARREST OF CIVILIANS.

The Tenth Circuit judgment in the present case failed to note any difference in the legislative climate between pre-1989 military drug enforcement and the present rules. The precedent set by the Tenth Circuit judgment is that military law enforcement agents operating within the Tenth Circuit are now fully authorized to **initiate**, as well as participate in, the search and seizure and the arrest of civilians whenever the civilians are interacting with military

defendants. "Mrs. Applewhite's husband, not the military, was responsible for the involvement of his civilian wife." Pet. App. 13a. An examination of the fact situations in the pre-1989 "exclusionary rule" cases involving military drug enforcement activities indicates that this was not the law in 1986. See discussion below. It most certainly is not the present law.

In 1989, Congress passed 10 U.S.C. § 375 as part of the National Defense Authorization Act of 1989. The purpose of the legislation was to implement military participation in the "war on drugs." The House Conference Report states that:

> ...[N]one of the federal law enforcement agencies have requested use of military personnel to supplement their arrest, search and seizure functions...
>
> The demand by some for use of the military in drug-related arrests would quickly fade in the face of actual law enforcement confrontations between the uniformed military and American

> civilians...The Posse Comitatus Act, as one court has noted, is not "an anachronistic relic of an historical period the experience of which is irrelevant to the present. It expresses the inherited antipathy of the American to the use of troops for civil purposes...Its relevance to this age is sadly clear." *Wrynn v. United States*, 200 F. Supp. 457, 465 (E.D. N.Y. 1961).

House Conf. Rep. No. 100-989, at 453, *U.S. Code Cong. & Admin. News*, 100th Cong. 2d Sess., vol. 5 at 2503, 2581.

In furtherance of the Congressional purpose, the Secretary of Defense has promulgated certain "*Restrictions on direct assistance*" of military personnel working with civilian authorities. 32 C.F.R. § 213.10(a)(3)(ii). Three of the forms of direct assistance specifically proscribed are a search or seizure; an arrest, stop and frisk, or similar activity; and use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents,

investigators, or interrogators. Exception to these restrictions are:

> [a]ctions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities. This provision must be used with caution, and does not include actions taken for the primary purpose of aiding civilian law enforcement officials or otherwise serving as a subterfuge to avoid the restrictions of the Posse Comitatus Act...

32 C.F.R. § 213.10(a)(2)(i).

The significance of these regulations to off-base undercover actions against military personnel was considered in *Thompson*. There the defendant was military, and the evidence seized was stolen civilian property. The search warrant was civilian, but was based on military information. Both military and civilian law enforcement officers were present at the arrest. The Court of Military Appeals held that the military had concurrent jurisdiction over crimes

committed in the civilian community by military personnel, that the military activities were done primarily to enforce military law and, therefore, there was no violation of the *Posse Comitatus* Act or the Secretary's regulations.

In the present case, we have a drug "bust" which arguably began primarily for military purposes, i.e., to arrest military personnel for off-base offenses under the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940. There was, however, no coordination with the civilian authorities to deal with civilian participants until after the fact. Further, the Air Force never had concurrent or any other jurisdiction over Applewhite because she was a civilian and was not subject to the Uniform Code of Military Justice. Therefore, taking Applewhite into custody and transporting her to the base for detention could not be primarily undertaken for a legitimate military or

foreign affairs purpose. Despite the total lack of jurisdiction, the military officers did take Applewhite into custody, and transported her to a military reservation where they searched her person. In short, they treated her like a member of the armed forces up to the point of charging her with an offense under the Uniform Code of Military Justice. It should be remembered that Applewhite was wearing a postal service uniform at the time, and no one has claimed there was there was a mistake as to her status.

The U. S. Court of Military Appeals has held that the seizure of civilian evidence by the military is proper where civilian authorities are present at the search and arrest, the military has concurrent jurisdiction over the defendant, and the primary reason for the military involvement is to enforce the Uniform Code of Military Justice, not to aid civilian authorities. *Thompson*, 33 M.J. at 221. The Tenth Circuit judgment now extends this to sanction off-base

raids by the military without any prior coordination with the civilian authorities, and allows military officers to take civilians into custody, transport them to military places of detention and only then inform the civilian authorities. The time has come to make some basic distinctions.

The defendants argued on appeal that Applewhite was analogous to a piece of civilian evidence which was accidentally seized at the off-base "bust." Applewhite is **not** a piece of evidence. She is a person with constitutional and statutory rights. She was not under the jurisdiction of the military, concurrent or otherwise. The actions of the OSI officers were merely a subterfuge to avoid the restrictions prescribed by the *Posse Comitatus* Act on how they can handle civilians caught up in their military drug enforcement activities. In 1989 Congress had the opportunity to repeal the *Posse Comitatus* Act and permit the military to engage in direct law

enforcement activities in order to promote the "war on drugs." Congress deliberately refused to do so. The Tenth Circuit should not be permitted to countermand Congress' decision.

III. IN REFUSING TO APPLY AN EXCLUSIONARY RULE TO MILITARY INTRUSIONS INTO CIVILIAN LAW ENFORCEMENT, SEVERAL CIRCUITS HAVE STATED THAT THEY WILL RECONSIDER THE ISSUE IF THERE WAS FUTURE ABUSE. THE PRESENT CASE REPRESENTS AN EGREGIOUS ABUSE OF POWER BY THE MILITARY AND THIS COURT SHOULD RECONSIDER SPECIFIC JUDICIAL REMEDIES.

In 1974, the Fourth Circuit Court of Appeals considered the application of the *Posse Comitatus* Act to create an exclusionary rule which would exclude evidence obtained as the result of illegal military intrusions into civilian law enforcement investigations. *See, Walden*. The evidence in *Walden* consisted of the testimony of three Marines and a Treasury Agent who posed as ordinary firearms purchasers while actually working as undercover agents. Unlike the present

case, the operation was fully coordinated with the civilian Treasury agents and there is no indication that the Marines made the actual arrest. The Court noted that "this case is the first instance to our knowledge in which military personnel have been used as the principal investigators of civilian crimes..." *Walden*, 490 F.2d at 377. Therefore, the Fourth Circuit declined to apply an exclusionary rule against the military investigators. However, the court reserved "the possibility that such a rule may be called for should repeated cases involving military enforcement of civilian laws demonstrate the need for the special sanction of a judicial deterrent." *Walden*, 490 F.2d at 373. This reservation was confirmed in later cases involving violation of military regulations and/or the *Posse Comitatus* Act by military investigators in drug cases. *See State v. Wolffs*, 594 F.2d 77 (5th Cir. 1979); *United States v. Hartley*, 796 F.2d 112 (5th Cir. 1986).

The federal cases refusing to apply an exclusionary rule uniformly involved the use of military undercover agents working in coordination with civilian authorities. In many of these cases, the military involvement was so minimal as to raise questions as to whether there was, in fact, a violation of the *Posse Comitatus* Act. *See, for example, Haynes v. Hawes*, 921 F.2d 100 (7th Cir. 1990), decided under the 1989 amendments to the Act, where the military did not become involved in any of the arrest, search and seizure or transportation of the evidence.

One case which did apply an exclusionary rule concerned a military police officer who made an off-base purchase of drugs with money provided by the civilian police department. *See, Taylor*. As in the present case, the justification for military presence was that the sale involved two enlisted men. The military officer was present during the arrest, pulled out a gun, helped the civilian authorities search the

apartment and transported the evidence. The state court held that "military intervention was excessive" and excluded the evidence obtained at the arrest. Although *Taylor* has been cited as an example of "pervasive" military presence justifying the imposition of an exclusionary rule, see discussion in *Haynes*, 921 F.2d at 103, the military action was still less than in the present case. In *Taylor*, the civilian authorities coordinated the operation and were at the scene of the arrest. There was no attempt to transport the civilian defendant onto a military reservation or to obtain civilian approval after the fact.

Because Applewhite was never charged or prosecuted by the civilian authorities, there is no exclusionary rule issue in the present case. As far as Applewhite is concerned, the application of an exclusionary rule is not an appropriate remedy. If there is a remedy other than an action under the Federal Tort Claims Act and a *Bivens* action,

Applewhite is unaware of it. The Tenth Circuit, however, has ruled that the *Bivens* action and, under law of the case, the Tort Claims action fail because Applewhite was not entitled to any special consideration "just because she was a civilian." Pet. App. 14a. The clear implication is that it is not against the law for military officers to arrest, search and seize evidence from civilians where a drug "bust" is involved, subject only to general considerations of probable cause. Pet App. 10a and 13a. This was not the law in 1986 and is not the law now. *Haynes*.

In *Laird* this Court stated that actual or threatened injury by reason of unlawful activities by the military would not go unnoticed or unremedied. In the present case, the Tenth Circuit has expressed their disagreement by finding that blatant violations of the *Posse Comitatus* Act were reasonable under the circumstances of a civilian "intruder/participant" in an off-base drug "bust." The Tenth Circuit's decision to

disregard the *Posse Comitatus* Act has deprived Applewhite of her remedy. Further, the facts in the present case are so egregious that the Tenth Circuit judgment will have a chilling effect on any future attempts to obtain redress for military intrusions into civilian law enforcement which occur within the Tenth Circuit. Applewhite respectfully requests this Court to issue a writ and to clarify Applewhite's remedy in this case.

CONCLUSION

Applewhite respectfully requests this Court to grant her writ of certiorari and (1) summarily vacate or reverse the judgment of the Tenth Circuit Court of Appeals, or (2) set this case for plenary consideration.

Respectfully submitted,

JOHN R. POLK
Counsel of Record
United New Mexico Bank Building
320 Gold, S.W., Suite 910
Albuquerque, NM 87102
(505) 247-1100

APPENDICES

APPENDIX A

Carol J. APPLEWHITE,
Plaintiff-Appellee,

v.

UNITED STATES AIR FORCE,
Defendant,

Randall L. Faulkner, Leonard Ross,
and William E. McBride,
Defendants-Appellants.

No. 92-2062.

United States Court of Appeals,
Tenth Circuit.

June 9, 1993.

[Rehearing Denied Aug. 10, 1993.]

995 F.2d 997

Before KELLY and BARRETT, Circuit Judges,

and OWEN, District Judge.*

OWEN, Senior District Judge.

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* The Honorable Richard Owen, Senior United States District Court Judge for the Southern District of New York, sitting by designation.

As part of its efforts to deal with illegal drug activity by enlisted personnel on the Kirtland Air Force Base,[1] the United States Air Force Office of Special Investigations (OSI) conducted an undercover drug "sting operation" in an off-base Albuquerque, New Mexico apartment on August 1, 1986. The operation was of the "buy-bust" type; any military personnel purchasing drugs was to be immediately arrested. The operation was expected to last only a few hours before its inevitable exposure due to the probable notoriety of any arrests.[2]

The undisputed facts are as follows. Airman First Class William Applewhite lived with his wife Carol on the Kirtland base. They drove into Albuquerque together; he to buy drugs at the "sting"

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[1] Kirtland Air Force Base is located in Albuquerque, New Mexico.

[2] The OSI agents were instructed that any civilian who came on the scene and became involved in the operation could be detained until that person could be turned over to local authorities.

apartment. Upon arrival at the "sting" apartment, Airman Applewhite went inside and his wife stayed in the car. Once inside, Airman Applewhite asked a woman undercover agent for marijuana[3] saying, "Let me check with Carol and see if she's interested in buying cocaine." He then went down to the car, talked a couple of minutes with Carol and then they both came back up to the apartment. Mrs. Applewhite, a United States Postal Service employee, was wearing her Postal Service uniform at the time. While there is a factual dispute as to whether once inside the apartment Mrs. Applewhite had a conversation with her husband about purchasing drugs for friends and furnished the money for the marijuana,[4] or whether she only asked for, and got a drink of water,[5] Mrs.

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[3] The OSI agents were instructed that any civilian who came on the scene and became involved in the operation could be detained until that person could be turned over to local authorities.

[4] OSI Agent Filipovich's testimony.

[5] Mrs. Applewhite's testimony.

Applewhite has acknowledged that she was aware her husband's marijuana purchase was going on at a time she was in the same room in the apartment.[6] In any event, her husband was forthwith arrested, and as is routine, and in order to be sure that Mrs. Applewhite posed no threat to the arresting authorities, she was subjected to a pat-down search. During the pat-down search a partially-filled syringe with a hypodermic needle which had been in her knee-high stocking fell out or she pushed it out onto the floor.[7] The search also revealed amphetamines in her purse. She was then handcuffed and both she and her husband were transported by OSI agents back to Kirtland.

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[6] Her testimony was that "[t]hey were doing some sort of an exchange...."

[7] When asked on her deposition why there was a syringe in her sock, Mrs. Applewhite testified: "I had found it in my car and I had a habit of carrying stuff in my socks as it was, and I just kind of stuck it there until I--for some reason I left, I believe."

Upon arriving at Kirtland, plaintiff was partially strip-searched and interviewed by OSI personnel. When OSI finished questioning her, she was brought to a conference room where her husband was being detained, and was herself detained approximately two to three hours. During this time, a member of the OSI "sting" unit, who at other hours was also a member of the Albuquerque Police Department, called the Albuquerque Police and told them that they had a civilian in custody and asked if they wanted to take over that part of the investigation. The Albuquerque police declined. Mrs. Applewhite was thereupon released. OSI later reported the incident to the United States Postal Service, following which plaintiff lost her job.

Airman Applewhite was court-martialed for the said events of August 1, 1986. Mrs. Applewhite, on the

other hand, filed a *Bivens* action for damages[8] against three OSI Officers involved in the "sting", Faulkner, Ross, and McBride, alleging violations of the *Posse Comitatus* Act[9] and the Fourth and Fifth Amendments to the United States Constitution. The said officers moved for summary judgment on the ground of qualified immunity, contending that their acts did not violate any clearly established statutory or constitutional right of Mrs. Applewhite of which a reasonable person would have known, citing *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d

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[8] *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *Bivens* established that a civilian has a cause of action against a federal official in his individual capacity for damages to the civilian arising out of the federal official's violation of federal constitutional law.

[9] The Posse Comitatus Act, 18 U.S.C. § 1385, states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

396 (1982). The District Court denied the officers' motion on *Posse Comitatus* Act grounds stating that "military law enforcement officers generally know that it is clearly established law that they have absolutely no authority to go outside the confines of a military installation and arrest a civilian, transport her to a military installation, detain and strip search her."[10]

This appeal followed pursuant to 28 U.S.C. § 1291.[11] We review legal determinations of the Court below *de novo* resolving any material factual issues in favor of Mrs. Applewhite. *Austin v. Hamilton*, 945 F.2d 1155, 1158 (10th Cir.1991). The defendants having raised the qualified immunity defense, the

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[10] *Applewhite v. U.S. et al.*, No. 88-0821, slip op. at 2 (D.N.M. Mar. 19, 1992).

[11] "The entitlement to qualified immunity 'is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 644 (10th Cir.1988) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985) (emphasis in original)). Accordingly, an immediate appeal may be taken from a denial of immunity.

burden is on the plaintiff to marshal facts showing that (1) the defendants' conduct violated the law, and (2) the law was clearly established when the violation occurred. *See, Siegert v. Gilley*, ___ U.S. ___, ____, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991); *Snell v. Tunnell*, 920 F.2d 673, 696 (10th Cir.1990), *cert. denied*, ___ U.S. ____, 111 S.Ct. 1622, 113 L.Ed.2d 719 (1991). Plaintiff having endeavored such a showing, defendants must then establish that no material facts preclude summary judgment on the basis of qualified immunity. *Salmon v. Schwarz*, 948 F.2d 1131, 1136 (10th Cir. 1991).

It is now well established that a law-enforcement official is entitled to qualified immunity if his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S., at 818, 102 S.Ct. at 2738 (citations omitted). Subsequently, *Anderson v. Creighton*, 483 U.S. 635,

639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1986), stated, "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, *Harlow*, 457 U.S., at 819 [102 S.Ct. at 2739], assessed in light of the legal rules that were 'clearly established' at the time it was taken, *id.*, at 818 [102 S.Ct. at 2738]." *Anderson* further stated, "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, ...; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* 483 U.S. at 640, 107 S.Ct. at 3039 (citations omitted). And even more recently, in *Hunter v. Bryant*, ___ U.S. ____, 112 S.Ct. 534, 116 L.Ed.2d 589

(1991), the Court stated how the standard is to be viewed.

> The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' ... This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued.

Hunter, ___ U.S. at ____, 112 S.Ct., at 537 (citations omitted).

Here, the military having set up a "sting" for errant military personnel, Airman Applewhite came into the "sting" apartment and sought to buy marijuana. Unexpectedly, the Airman brought his civilian wife up from the car and thereafter concluded the exchange in her presence. Upon his being immediately busted, the search of his wife was reasonable to be sure she posed no threat to the agents. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968). That search revealed her possession of a partially-filled hypodermic and

needle in her stocking, and amphetamines in her handbag. The totality of the foregoing made it reasonable for the agents to regard her as a participant with him in a narcotics buy and remove her *somewhere* while the Albuquerque Police were contacted to see if they would take over this civilian intruder/participant in the military "sting." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 226, 13 L.Ed.2d 142 (1964); *United States v. Allen*, 986 F.2d 1354, 1357 (10th Cir.1993); *United States v. Romero*, 692 F.2d 699, 703 (10th Cir.1982). The agents were not required to let her go, given what they had learned about her, nor were they required to hold her in the "sting" apartment or in a car while waiting for an answer from the Albuquerque Police Department. Accordingly, the removal to the base with her husband was, we conclude, reasonable. Given all this, the partial strip search at the base was the product of particularized, reasonable suspicion and was not

unreasonable, particularly in view of what the pat-down search at the apartment had already revealed. *Chapman v. Nichols*, 989 F.2d 393, 396, 398-99 (10th Cir.1993).

The *Posse Comitatus* Act is clearly designed to restrict military involvement in civilian law enforcement. *United States v. Walden*, 490 F.2d 372, 375 (4th Cir.1974), *cert. denied*, 416 U.S. 983, 94 S.Ct. 2385, 40 L.Ed.2d 760 (1974). It is not intended to limit the military in preventing illicit drug transactions by active duty military personnel, whether such conduct occurs on or off a military installation. *Hayes v. Hawes*, 921 F.2d 100 (7th Cir.1990), *Harker v. State*, 663 P.2d 932, 936 (Alaska 1983). Since there was an independent military purpose to OSI's conduct, there was necessarily no wilful use of any part of the Air Force as a posse to execute civilian laws, nor did military law enforcement officers go outside the confines of a military

installation to arrest a civilian as the Court below viewed it. The agents went off base to "sting" military personnel, not civilians. Mrs. Applewhite's husband, not the military, was responsible for the involvement of his civilian wife. This being established on the undisputed facts on this record, there was no violation by the OSI agents of any "clearly established statutory rights" of Mrs. Applewhite.

As to her claim that the OSI agents violated some clearly established *constitutional* rights under the Fourth and Fifth Amendments--a ground the Court below did not reach--we but observe that based on the said undisputed facts,-- she having been brought in to the point of sale by her buyer husband, and the contraband thereafter found on her person, it was objectively reasonable for the agents to detain the plaintiff somewhere long enough to inquire as to whether civilian authorities had any interest in taking over any prosecution. In these circumstances, the

agents could hardly have justified her immediate release just because she was a civilian. *United States v. Ortiz*, 966 F.2d 707 (1st Cir.1992), *cert. denied*, ___ U.S. ____, 113 S.Ct. 1005, 122 L.Ed.2d 154 (1993); *United States v. Lema*, 909 F.2d 561 (1st Cir.1990); *United States v. Banks*, 539 F.2d 14, 16 (9th Cir.), *cert. denied*, 429 U.S. 1024, 97 S.Ct. 644, 50 L.Ed.2d 626 (1976).

Accordingly, there having been no violation of plaintiff's rights in either the statutory or constitutional areas, *Harlow v. Fitzgerald, supra*, mandates the grant of qualified immunity to the agents.

Accordingly, the order of the District Court denying summary judgment to the appellant agents is reversed, and the action is remanded to the District Court with directions to grant summary judgment to Officers Ross, McBride, and Faulkner dismissing the action on the grounds of qualified immunity.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

CAROL J. APPLEWHITE,

Plaintiff,

vs. No. CIV 88-0821-SC

THE UNITED STATES OF AMERICA, UNITED STATES AIR FORCE, and OPAL KNOWLES, RANDALL L. FAULKNER, LEONARD ROSS, WILLIAM E. MCBRIDE, MICHAEL C. SAVAGE, KATHERINE MCKENZIE, Individually,

Defendants.

MEMORANDUM OPINION AND ORDER

This case is before me on two motions: (1) Motion for (partial) Summary Judgment on Behalf of Defendants Randall L. Faulkner, Leonard Ross and William McBride, which is based on the defense of qualified immunity; and (2) Defendants' Motion *in Limine* To Bar Reference at Trial to Plaintiff's

Termination by the Postal Service. Both motions will be denied.

Background. In this case a civilian was caught up in a drug sting operation conducted by military law enforcement officers. Plaintiff Carol J. Applewhite accompanied her husband, a member of the Air Force, to an off-base apartment. Ms. Applewhite's husband purchased drugs and was immediately busted. Plaintiff was also arrested, pat-down searched, handcuffed and transported by military police to the nearby Air Force base where she was subjected to a partial strip search. Only then were civilian law enforcement authorities contacted; they declined to prosecute. Plaintiff was then interviewed and later brought to a room where her husband was being detained. Plaintiff's husband was court martialed for his role in the drug transaction. Plaintiff, who was a Postal Service employee in uniform at the time of the incident, was reported to

the Postal Service by military personnel and allegedly lost her job as a result.

Plaintiff has two causes of action, the first for the torts of false arrest and illegal detention brought against the United States of America under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq*. The second is a *Bivens* action against individual federal officers for constitutional violations. This claim is based on the alleged violation of a federal statute designed to keep the military out of civil law enforcement, the *Posse Comitatus* Act, 18 U.S. C. § 1385. Only three of the six individual defendants have been served. The other three, Opal Knowles, Michael C. Savage, and Katherine McKenzie, were dismissed without prejudice.

Previously by Order of August 24, 1989 I denied a motion for summary judgment filed by Defendants Faulkner and Ross based on qualified immunity. I

held that "law enforcement officers generally know that it is clearly established law that they have absolutely no authority to go outside the confines of a military installation and arrest a civilian, transport her to a military installation, detain and strip search her." Memo.Op. at 5. I also found there was a factual dispute as to the extent of the involvement of Faulkner and Ross in Plaintiff's situation.

Motion for Summary Judgment based on Qualified Immunity. The present motion based on qualified immunity is reasserted on behalf of Defendants Faulkner and Ross, and is also brought for the first time on behalf of Defendant McBride. It relates only to the *Bivens* cause of action.

The standard for the defense of qualified immunity in a Fourth Amendment case is whether the defendant's action was objectively legally reasonable in light of clearly established legal rules at the time the action was taken. *Anderson v. Creighton*, 483 U.S.

635, 639 (1987). A determination of whether an arrest or search was objectively legally reasonable often requires examination of the information possessed by the arresting or searching officials. *Anderson v. Creighton*, 483 U.S. at 641; *Salmon v. Schwarz*, 948 F.2d 1131, 1136 (10th Cir. 1991).

The facts as to the participation of and information possessed by Defendant McBride, viewed in the light most favorable to Plaintiff, are that he was not in charge of the sting operation but he was the assistant to the agent in charge, Michael Savage. During the operation in the off-base apartment where Plaintiff was arrested, McBride was not in the room where the drug transaction took place (he was recuperating from knee surgery and was assigned to listen on a radio in the bedroom of the apartment), he did not arrest Plaintiff nor did he question or search her. According to Savage, however, McBride and others were "primarily involved" with Plaintiff when

the bust occurred. Savage Depo. at 117. He did not transport her back to the Air Force base. He also did not participate in the decision to confiscate her Postal Service I.D. and government driver's license, and had no contact with the Postal Service that allegedly led to her termination from her job as a letter carrier.

On the other hand, McBride was fully briefed beforehand on the operation, and specifically was party to a plan to detain all civilians who might accompany military personnel in the off-base buys until the sting operation was over, not for security purposes, but rather so those persons would not spoil the day by broadcasting the fact of the sting to other potential targets. The plan was described by McBride:

> In the case of a civilian . . . we probably would have tried some subterfuge first to get rid of them; that failing, ask them for cooperation. That failing, detain them.

McBride Depo. at 55. Also, McBride knew Plaintiff was a civilian and he was in the room when she was

initially placed under arrest and pat-down searched by Opal Knowles. He did not protest her arrest. Later at the base he spoke with her about the status of her husband, and explained her status to her, i.e. that the civilian authorities were not going to arrest her and she was not under arrest at that time by the military police. After civilian authorities were contacted and declined to prosecute Plaintiff, McBride claims he offered to let her go and she elected to stay with her husband. However, even after McBride talked to her and "tried to make it very clear to her that she wasn't under arrest," McBride Depo. at 58, the military police subjected to a "voluntary" interview.

It is significant that there was no coordination with any civilian law enforcement authority until after the fact. *See, e.g.*, Clark, "Electronic Surveillance and Related Investigative Techniques," 128 Mil.L.Rev. 155 (1990):

> DOMESTIC OFF POST: regardless of the target's status (civilian or military), the operation must be supported by both the appropriate civilian prosecutorial and law enforcement authorities. . . . Local law enforcement must be either in position or available to provide police assistance *should . . . arrests become necessary.*

Id. at n. 84 (emphasis added).

Even though there is no evidence that McBride participated physically in the illegal actions towards Plaintiff or personally made the decisions that caused her to be arrested, strip searched, transported to the Air Force base and detained there, McBride has not established that he is entitled to qualified immunity as a matter of law. He knew what the plan was, participated in the plan, and the plan was carried out in his presence and with his assistance. The plan cannot be said to be objectively reasonable as a matter of law. His actions in furtherance of the plan, therefore, were not objectively reasonable as a matter of law. His participation was not of the type that

would entitle him to qualified immunity. *Compare, Salmon v. Schwarz*, 948 F.2d 1131, 1140-41 (10th Cir. 1991) (agent who executed facially valid but defective arrest warrant entitled to qualified immunity because he possessed no knowledge of lack of probable cause).

The involvement of Defendants Faulkner and Ross was different from that of McBride, in that they may not have been as involved in the planning phase. However, they were at least briefed on the plan to detain civilians and they participated even more directly in Plaintiff's detention. They were, in McBride's words, "two cops that we borrowed." McBride Depo. at 23. They were assigned to conduct surveillance outside the apartment where the buy-busts were occurring, and to transport arrestees back to the base. They had no direct personal contact with Plaintiff until after she had been arrested, transported to the base, strip searched and allegedly officially released. She was then brought to the holding room

where her husband was being detained and guarded by Faulkner and Ross. Ross testified in his deposition that if Plaintiff had walked out of that room, he would have "asked her to hold it" while he contacted other agents to see if she was free to go. Ross Depo. at 42. His main job was to guard the suspects and to keep Plaintiff from talking to her husband. Faulkner also testified that if Plaintiff had stood up and tried to walk out the door, he would have detained her to find out what he was supposed to do, and that he understood she was "under some form of detention at that point." Faulkner Depo. at 29.

This testimony is certainly consistent with the plan to detain civilians until they no longer posed a threat to the integrity of the sting operation, and this additional detention occurred even after the alleged release of Plaintiff from arrest. It cannot be said on this state of facts that Faulkner's and Ross' actions were objectively reasonable as a matter of law.

Defendants also argue that the individual Defendants are entitled to qualified immunity because it was not clearly established that the *Posse Comitatus* proscription against military involvement in civilian law enforcement would encompass a case like this where "a civilian is swept up in an operation intended to detect and punish wrongdoing by military personnel." However, it is the law of this case that what is alleged to have happened to Plaintiff involved a violation of clearly established law. Memo.Op. of 8/24/89 at 5. None of the arguments of Defendants (asserted only in their reply brief) would suffice to change the rulings in this case.

Defendants also argue that even courts such as *United States v. Walden*, 490 F.2d 372 (4th Cir.), *cert. denied*, 416 U.S. 983 (1984) that have found a violation of the *Posse Comitatus* Act have refused to let that violation be used to suppress evidence in the underlying criminal prosection. Thus, they reason,

this Court should not allow Plaintiff to recover a civil damages remedy. The Court does not agree. If courts have been reluctant to fashion an exclusionary rule for violation of the Act, that is all the more reason to allow a civil damages remedy for such a violation. Otherwise there would be no recourse left for civilians to enforce this important protection.

> [T]he courts must force the Department [of Defense] out of its lethargy in an area where it should have been meeting its responsibilities without prompting. . . .
>
> [Military commanders] must understand that although each incident, isolated and viewed alone, may do little harm to our constitutional principles, it is the collective effect and the gradual erosion of the democratic principle of non interference by military authority in domestic matters that must be guarded against.

Meeks, "Illegal Law Enforcement: Aiding Civil Authorities in Violation of the *Posse Comitatus* Act," 70 Mil.L.Rev. 83, 133-35 (1975). A *Bivens* private cause of action for damages for violation of the *Posse*

Comitatus Act has been recognized in *Bissonette v. Haig*, 800 F.2d 812 (8th Cir. 1986) (*en banc*) (violation of act states claim for unreasonable search and seizure under 4th Amendment), *aff'd, lack of quorum*, 485 U.S. 264 (1988).

Moreover, some courts have afforded relief to criminal defendants where a violation of the Act was alleged. *See, e.g., Taylor v. State*, 645 P.2d 522 (Okla.App. 1982) (evidence suppressed); *United States v. Banks*, 383 F.Supp. 368, 374-76 (D.S.D. 1974) and *United States v. Jaramillo*, 380 F.Supp. 1375 (D.Neb. 1974) *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975) (defendants acquitted due to possible violation of Act because prosecution could not prove beyond a reasonable doubt that officers were lawfully engaged in lawful performance of duties, a necessary element).

For these reasons the motion for summary judgment will be deined.

Motion *in Limine*.

The damages sought by Plaintiff in both counts of her Amended Complaint include lost wages due to her loss of employment with the United States Postal Service. Defendants have filed a Motion *in Limine* to bar reference at trial to Plaintiff's termination by the United States Postal Service. They base their motion on two grounds, both of which miss the mark.

First, they argue that Plaintiff's exclusive remedy for any damages for her termination is through the administrative procedures prescribed by the Postal Service. They lead the Court through a detailed but inapplicable analysis of the remedy available to Plaintiff if she were challenging the Postal Service's decision to terminate her. She is not.

Second, they argue that Plaintiff's damages claim against the United States under the Federal Tort Claims Act is preempted by federal law. Again, this argument might apply if Plaintiff were suing for

damages caused by Postal Service personnel. She is not.

Defendants seem to misperceive the thrust of Plaintiff's claims. This is not an employment case; it is a Fourth Amendment *Bivens* action and a tort action for false arrest and illegal detention. It does not challenge the actions of Postal Service employees for anything they may have done in the process of her termination, but rather the actions of Air Force personnel for causing the Postal Service to terminate her.

The motion *in Limine* will be denied.

ORDER

For the reasons contained in the above Opinion,

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment is not well taken and it should be, and is hereby, DENIED;

IT IS FURTHER ORDERED that Defendants' Motion *in Limine* is DENIED.

/s/ Santiago E. Campos

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CAROL J. APPLEWHITE,

Plaintiff - Appellee,

v. No. 92-2062

UNITED STATES AIR FORCE,

Defendant,

and

RANDALL L. FAULKNER, LEONARD ROSS, WILLIAM E. MCBRIDE,

Defendants - Appellants.

ORDER
Entered August 10, 1993

Before McKay, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

This matter comes on for consideration of plaintiff's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

_____

ROBERT L. HOECKER, Clerk

APPENDIX D

CONSTITUTIONAL PROVISIONS

AMENDMENT IV

(Security from

Unwarrantable Search and Seizure)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

(Rights of Accused

in Criminal Proceedings)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

18 U.S.C. § 1385

Use of Army and Air Force

as *posse comitatus*

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

10 U.S.C. § 375

Restriction on Direct Participation

by Military Personnel

The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or

facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

APPENDIX E

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CAROL J. APPLEWHITE,

Plaintiff-Appellee,

vs. **No. 92-2062**

THE UNITED STATES OF AMERICA, UNITED STATES AIR FORCE, and OPAL KNOWLES, RANDALL L. FAULKNER, LEONARD ROSS, WILLIAM E. McBRIDE, MICHAEL C. SAVAGE, KATHERINE McKENZIE, Individually,

Defendants-Appellants.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Petitioner, Carol J. Applewhite, hereinafter Applewhite, petitions this Court for a rehearing on the its Opinion filed June 9, 1993. This is a civil case in which the United States Air Force is a party.

As grounds for her petition, Applewhite states the following:

1. I, John R. Polk, counsel for Carol Applewhite, express a belief, based on a reasoned and studied profession [sic] judgment, that this appeal involves one or more questions of exceptional importance: What are the appropriate limits on the arrest and detention of civilians by military officials engaged in off-base law enforcement activities.

Because of the importance of the issue of what are the appropriate limits on the arrest and detention of civilians by military officials engaged in off-base law enforcement activities, Applewhite suggests that the rehearing be held *en banc*.

2. This Court's Opinion dated June 9, 1993 is based upon the allegedly "undisputed" fact that Applewhite was found to be in possession of "contraband," even though this fact was **never** established by competent evidence or briefed on appeal and is disputed by Applewhite.

3. This Court's Opinion holds that Applewhite's possession of "contraband" made her into a "civilian intruder/participant" in a military sting, which, in turn, justified her removal and detention at a military reservation. Opinion at 6. Contrary to this Court's Opinion at 7, neither Applewhite's possession of "contraband" nor her role as a "civilian intruder/participant" were undisputed facts. Further, this Court's Opinion does not define the status of an "intruder/participant" in a military sting, nor does it cite any authority for the proposition that being a "civilian intruder/participant" in military stings deprives a person of her civilian status or her constitutional rights.

4. This Court's Opinion fails to construe the facts in favor of Applewhite, the nonmovant in the summary judgment procedure as required by law. See, *Luckett v. Bethlehem Steel Corp.*, 618 F.2d 1373 (10th Cir. 1980); *Austin v. Hamilton*, 945 F.2d 1155

(10th Cir. 1991). To the contrary, this Court's Opinion explicitly resolves disputed facts in favor of the movants and recounts testimony which even the movants admitted was disputed. See discussion below.

5. Applewhite's amended Complaint filed April 5, 1989, stated a tort claims action against the United States Air Force and a *Bivens* action against three Air Force OSI officers, alleging violation of the Fourth and Fifth Amendments to the United States Constitution. App. 1-4. Only the *Bivens* action against the individual Defendants is at issue in this appeal.

6. In February and March 1989, Defendants Ross and Faulkner made a motion for summary judgment based upon the defense of qualified immunity.[12] Supp. App. 03 and 09. Ross and Faulkner asserted in their motions that they had

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[12] The original Complaint in this action was filed on July 11, 1988.

nothing to do with Applewhite's arrest or transportation on to a the [sic] military base, but were merely present to "ensure that she and her husband did not discuss the drug investigation when they were together at the OSI building" on the military reservation. Supp. App. 04; see also 12.

7. Defendants' first motion for summary judgment was denied August 24, 1989. App. 9.

8. Defendants Faulkner and Ross and Defendant McBride made another motion for summary judgment based upon the defense of qualified immunity on February 3, 1992. App. 20, 197. Their statement of allegedly "undisputed facts" mentions that a "used hypodermic syringe and needle" was found on Applewhite. App. 27. The contents of the syringe were not disclosed. There was no statement concerning the contents of Applewhite's purse, which was seized at the military base. Therefore, the possession of contraband by Applewhite was not at

issue in the summary judgment proceeding. F. R. Civ. P. 56; *Austin*. In their reply brief, Defendants agreed that there is a dispute as to Applewhite's role in the drug sale. App. 164. They argued that "this dispute is unrelated to any of the individuals named as defendants in this lawsuit." App. 164. They further argued that Defendants Ross and Faulkner were not present during the "reverse sting" and that McBride was on crutches in the informant's bedroom at the time of the arrest. App. 164-165. Finally, they argued that the defendants did not participate in either the search of Applewhite at the apartment or the partial strip search at the military base. App. 165-167.

9. In preparation for trial, Applewhite demanded production of her purse and its contents which were seized during her detention at the military base. Defendants failed to produce the purse or its contents, and disagreed among themselves as to whether the contents had been tested for contraband.

See Docket entries 123, 136, 139, 140, 146, in App. 197-198. These pleadings were not included in Applewhite's Supplemental Appendix because the existence of contraband was not put at issue in Defendants' motion for summary judgment. The order denying this motion is the only order on appeal. App 164. This Court in its Opinion, however, jumps to the assumption that Applewhite is guilty until proven innocent of possessing "contraband." Further, it makes possession of this "contraband" the basis of its Opinion on a summary judgment motion, thereby depriving Applewhite of the opportunity to have a trial on the merits. This is contrary to law. F. R. Civ. P. 56; *Austin*.

10. A pre-trial order was entered in the action on February 18, 1992. App. 149-160.

a. The pre-trial order stated that discovery had been completed and that the matter was set for trial on March 9, 1992. App. 156 and 159.

b. The pre-trial order described the uncontroverted facts which had been established by admissions in the pleadings or by stipulations of counsel as follows:

> On August 1, 1986, members of the United States Air Force placed under arrest and physically restrained Plaintiff, Carol J. Applewhite, a United States military dependent. Plaintiff was handcuffed and searched and her personal property was seized, along with property of the United States government in Plaintiff's possession. Plaintiff was removed without her consent from the place of her arrest to Kirtland Air Force Base, Albuquerque, New Mexico, a United States military reservation, where Plaintiff resided. Civilian authorities were contacted. All employees involved in the reverse sting operation were United States military personnel on active duty.

App. 151-152. Defendants' statement of the facts in their Brief in Chief does not go beyond this statement except to mention that plaintiff was wearing a Postal Service uniform at the time, that military personnel reported the incident to the Postal Service and that Plaintiff's husband was court martialed.

11. Defendants' second motion for summary judgment was denied by order of the District Court on March 19, 1992. App. 179.

12. This Court's Opinion was entered June 9, 1993 reversing the order of the District Court and remanding the action for entry of summary judgment in favor of Ross, McBride, and Faulkner.

13. This Court's Opinion correctly stated that any material factual issues were to be resolved in favor of Mrs. Applewhite. Opinion at p. 4. *Austin*. However, the Opinion utterly fails to follow its own rule.

14. Specifically, this Court's Opinion improperly recites the following allegedly "undisputed facts" which were not set forth in either the pre-trial order or the Defendants' Brief in Chief **because** they are disputed facts which cannot be resolved in a summary judgment proceeding.

a. "The OSI agents were instructed that any civilian that came on the scene and became involved in the operation could be detained until that person could be turned over to local authorities." Opinion at 1, note 2.

What Defendants actually alleged was that "the OSI had to coordinate the civilian's arrest with members of the Albuquerque Police Department." App. 25. This was based upon the deposition of Michael Savage who said that "we could detain civilians, who became parties to or participated in our operation, until such time as they could be turned over to civil authorities." App. 39. This was challenged by Applewhite because Defendant McBride had stated that he knew he had no authority to arrest civilians, Defendant Ross had stated that he had no jurisdiction over civilians, and the OSI reservist who was supposed to be coordinating with the Albuquerque Police

Department testified that he was not, in fact, coordinating with the APD. App. 102-103.

b. "Airman Applewhite asked a woman undercover agent for marijuana saying 'Let me check with Carol and see if she's interested in buying cocaine.'" Opinion at 1.

This comes from the testimony of Katherine McKenzie Filipovich, who later admitted that Mrs. Applewhite did not say that she was interested in purchasing any drugs for her own use. App. 79-80. Defendants' statement of undisputed fact was that Katherine McKenzie Filipovich "posed as the informant's girlfriend, and had a quantity of drugs for sale as the 'bait' in the operation." App. 26. Applewhite did not challenge that Katherine McKenzie Filipovich posed as the informants' girlfriend and had no reason to believe Filipovich's testimony would be used to make her into a participant in the drug sale. Defendants admitted in

their reply that the facts concerning Applewhite's participation in the drug sale were disputed. App. 164.

c. "Mrs. Applewhite has acknowledged that she was aware her husband's marijuana purchase was going on at a time she was in the same room in the apartment." Opinion at 2.

What Applewhite said was "They were doing some sort of an exchange as I was coming through, and that is when people came from all directions, it seems." App. 133. Applewhite clearly stated that she walked into the living room, saw her husband making a purchase and was immediately assaulted by the OSI officers. App. 132-133.

d. "During the pat-down search a partially-filled syringe with a hypodermic needle which had been in her knee-high stocking fell out or she pushed it out onto the floor. The search also revealed amphetamines in her purse." Opinion at 2.

Applewhite testified that "I don't know how many people grabbed me and held me like spread-eagled but standing, if you know what I mean, so that I couldn't get away." App. 135. The defendants asserted in their claim of disputed facts of the case in the pretrial order that,

> The pat-down search of Plaintiff revealed that she had concealed a partially filled, freshly used hypodermic needle and syringe in her knee high stocking....A search of Plaintiff's purse revealed...two paper bindles containing methamphetamines.

App. 150-152. These are not undisputed facts. See uncontroverted facts in pretrial order at App. 151-152 restated at 10B above. This is defendants' defense and absolutely denied by plaintiff.

The contents of the hypodermic syringe were not identified, and Defendants have failed to produce the purse or its contents.

e. "That search revealed her possession of a partially-filled hypodermic needle in her stocking, and amphetamines in her handbag." Opinion at 6.

The defendants asserted this proposition in their claim of disputed facts in the pretrial order. See 14d above. App. 150-151. Defendants have failed to produce the purse or its contents and the contents of the hypodermic syringe were not been [sic] identified.

f. "...and the contraband thereafter found on her person." Opinion at 8.

The defendants asserted this proposition in their claim of disputed facts in the pretrial order. See 14d above. App. 150-151. Defendants have failed to produce physical evidence of the existence of any contraband.

g. "Mrs. Applewhite's husband, not the military, was responsible for the involvement of his civilian wife. This being established on the undisputed facts on this record." Opinion at 7.

Even Defendants stated that the role of Mrs. Applewhite in the drug sale and the circumstances surrounding her presence at the "reverse sting" were disputed facts which could not be resolved in a summary judgment. App. 164.

h. "She having been brought in to the point of sale by her buyer husband, and the contraband thereafter found on her person, it was objectively reasonable for the agents to detain the plaintiff somewhere long enough to inquire as to whether civilian authorities had any interest in taking over prosecution." Opinion at 7-8.

It is disputed as to whether Applewhite was "brought in to the point of sale by her buyer husband," and it simply has not been established that defendants found "contraband" on her person. The defendants asserted this in their claim of disputed facts in the pre-trial order. See 14d above. App. 150-151.

15. The Opinion states that it was reasonable for the military police to remove a civilian "somewhere while the Albuquerque Police were contacted to see if they would take over this civilian intruder/participant in the military 'sting.'" Opinion at 6. Further, the military police "were not required to let her go ... neither were they required to hold her in the 'sting' apartment or in a car while waiting for an answer from the Albuquerque Police Department." Opinion at 6. First, it is disputed whether Applewhite was a "intruder/participant" in the sting or merely an innocent bystander. Second, this Court's Opinion cites no authority in support of the proposition that the military can "remove" a civilian anywhere. Third, this Court's Opinion fails to place any limits on where the military can "remove" a civilian to, i.e., strand her in the desert, fly her to Columbia, place her in a concentration camp. The possibilities are endless and,

according to this Court's Opinion, all perfectly constitutional.

16. Finally, this Court's Opinion resolves the real issue in this appeal, which is the constitutional limitations on military involvement in the arrest and detention of civilians, in a manner so inclusive of military intrusion into civilian affairs as to threaten the safety and security of the entire civilian public. This is inconsistent with the limits established in *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985) and 800 F.2d 812 (8th Cir. 1986).

This Court should grant a rehearing *en banc* of its Opinion of June 9, 1993, because the Opinion improperly resolves disputed facts in favor of the movant in a summary judgment proceeding, and because the Opinion fails to place any rational limits on the military's authority to "remove" civilians who become entangled with their off-base activities. The present Opinion is based upon disputed facts which

have not been tested by a trial on the merits and grants unintentionally broad powers to military authorities to "remove" civilians who get in the way of off-base narcotics enforcement activities. This Court should reconsider its holdings.

WHEREFORE Petitioner requests a rehearing *en banc* to properly review the facts of this case as required by law, and to determine the appropriate limits on the arrest and detention of civilians by military officials engaged in off-base law enforcement activities and whatever further relief this court deems just and proper.

JOHN R. POLK
Attorney for Plaintiff-Appellee
United New Mexico Bank Building

CERTIFICATE OF SERVICE

I hereby certify that on this 15th of July, 1993, I served the foregoing Petition for Rehearing and Suggestion for Rehearing *En Banc* for the Appellants Randall L. Faulkner, Leonard Ross and William E. McBride and Appellee's Appendix upon the opposing party by causing the appropriate number of copies to be mailed via U.S. mail, postage prepaid, upon:

HOWARD S. SCHER, ESQ.
Attorney, Appellate Staff
Civil Division Room 3343
Department of Justice
Washington, D.C. 20530

NINA PELLETIER, ESQ.
Trial Attorney, Torts Branch
U.S. Department of Justice
Post Office Box 7146
Benjamin Franklin Station
Washington, D.C. 20044

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JOHN R. POLK
Attorney for Plaintiff/Appellee